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United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Ernest C. Reed,

Appellant,

vs.

United States of America, Charles E. Sebastian, Chief of Police of the City of Los Angeles, and Patrick J. Phelan, Agent of the State of Iowa,

Appellees.

PETITION OF ERNEST C. REED FOR REHEARING.

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To the Honorable Justices of the Circuit Court of Appeals, of the United States, for the Ninth Circuit:

Your petitioner in the above entitled cause, to-wit: Ernest C. Reed, respectfully prays that a rehearing be granted therein for the following reasons:

PETITIONER RESPECTFULLY URGES THAT THE SAID COURT IN ITS OPINION ERRED IN CERTAIN OF THE VITAL STATEMENTS OF FACT.

The first of such mistakes which the petitioner respectfully urges is contained in the last few lines of

page 2 of the typewritten opinion wherein the court makes this statement, in speaking of the petition for writ of *habeas corpus:*

"There is no allegation of diversity of citizenship *and no allegation whatever that the petitioner is held in custody in violation of any of the statutes of the United States or of any provision of the federal constitution.*"

The attention of the court is particularly directed to the following language contained in the petition for writ of *habeas corpus* and which is set forth on page 6 of the transcript, to-wit:

"(c) That said requisition and said executive warrant issued by the governor of the state of California should not have been issued for the reason that the said Ernest C. Reed *is not now and was not at the time the requisition and the said governor's warrant was issued, nor at the time of the finding of said indictment, a fugitive from justice under section* 5278, *United States Revised Statutes.*"

This same matter was mentioned in the Assignment of Error [see page 59 of the transcript], as follows:

"Again that said District Court erred in excluding the testimony offered by petitioner for the purpose of showing that petitioner was publicly a resident within the state of Iowa for more than three years after the alleged commission of the alleged crime set forth in said indictment, and was for more than three years after the alleged commission of said offense not without the reach of criminal process of the state of Iowa AND IS THEREFORE NOT A FUGITIVE FROM JUSTICE."

The petition for writ of *habeas corpus,* upon which all the proceedings are based, distinctly refers to the fact that defendant was not a fugitive from justice under section 5278, United States Revised Statutes, and thereafter in referring to the matter simply the words "fugitive from justice" were used for the most part, but certainly they referred back to the section of the Revised Statutes above mentioned.

Furthermore, it is respectfully urged upon the court that unless the defendant was a fugitive from justice, no extradition could be had.

Therefore, with all due respect to the statement contained in the opinion, your petitioner asserts that there is a positive allegation that he is held in custody in violation of a statute of the United States, to-wit: section 5278, United States Revised Statutes.

A Further and Broader Consideration Is Due to the Question, "Is Petitioner a Fugitive from Justice?"

It is respectfully urged that the court has adopted too limited a view in the following statement on page 5 of said opinion (particular attention being directed to the words in italics):

"To the allegation of the petition that the petitioner was not in fact a fugitive from justice it is sufficient to refer to the language of the indictment, which charges him with the actual commission of the offense in the state of Iowa. *If he was in that state at the time the offense was committed he is, whenever he is thereafter found in another state, presumed to be a*

*fugitive from justice within the meaning of the constitution and the laws of the United States, no matter for what purpose or reason or under what circumstances he left the state. * * * That presumption might be overcome by proof that the petitioner was not in the state of Iowa at the time of the commission of the offense alleged."*

If the opinion in the instant case is to stand, then a man is a fugitive from justice under all conditions and circumstances whatsoever unless it be that he was not in the state at the time of the commission of the crime or of some integral part thereof; and this, no matter whether he may have continued to live in that state and be publicly known and be publicly a resident thereof either one year or fifty years after the crime is committed.

To epitomize the effect of Your Honors' decision:

A man is charged with having committed a crime in San Francisco in 1900.

That crime is barred in three years.

He continues to reside in San Francisco openly and publicly till 1914, all the while amenable to civil and criminal process.

He is unmolested for fourteen years.

In January, 1915, he removes to Maine.

He could not be prosecuted had he remained in California.

Yet by removing to Maine he becomes a "fugitive from justice" and can be extradited willy-nilly without leave to prove the bar of the statute.

Is such a man a fugitive from justice?

Under such conditions will Your Honors' decision stand the "acid test"?

In other words, the petitioner contends that if a crime has been committed within the demanding state and the defendant has been a resident of that state not only for the period allowed by the statute of limitations, but considerably beyond that time, then that the defendant is not a fugitive from justice within the meaning of section 5278 of the United States Revised Statutes.

To hold otherwise would be putting a very strained construction upon that section and upon the constitutional provisions which are its base and foundation.

To hold otherwise would be to say that a man charged with committing a crime upon which the statute of limitations was three years and who had lived publicly within that state for ten years after the alleged commission of the crime and who could not be prosecuted in the demanding state during eleven of those fourteen years, could nevertheless be forthwith extradited from another state to which he had removed after this period of residence merely by virtue of the fact that he had removed from the demanding state and had thus become a fugitive from justice. It seems to us that the absolute injustice of such a course is unanswerable.

In order for Your Honors to sustain that view you must expressly overrule a decision of the United States Circuit Court of Appeals, to-wit: the case of Bruce v. Raynor, 124 Fed. 481.

That case IS DIAMETRICALLY OPPOSED TO THE OPINION OF HONORABLE JUSTICE GILBERT IN THE CASE AT

BAR. For that reason we presume it must have been overlooked, for no mention or reference is made to it in the opinion written by Honorable Justice Gilbert. We now desire to call the court's attention to that case and to that case alone in order that the point we are now contending for may be established or discarded and the law laid down in that case shall be either affirmed or overruled.

This is particularly true in view of the language of the Honorable Justice Gilbert on page 4 of the typewritten opinion as follows:

"The indictment alleges that the offense was committed on June 7, 1909, and that from that date until the finding of the indictment, which was November 20, 1914, the accused has not been publicly a resident within the state of Iowa. THE QUESTION OF THE ALLEGED BAR OF THE STATUTE OF LIMITATIONS IS ONE THAT SHOULD BE LEFT TO THE DECISION OF THE COURTS OF THAT STATE UPON DEMURRER OR MOTION IN ARREST OF JUDGMENT."

From this statement it is plainly apparent that the court considered the urging of the bar of the statute to be a matter of defense. If that were not so it could not be raised either by demurrer or a motion in arrest of judgment, but in the case of Bruce v. Raynor, *supra,* it is distinctly declared:

"If, therefore, it could be shown that he (the defendant) did not conceal himself within the state during the period within which he was amenable to criminal process, *this would be evidence tending to establish the fact* THAT HE WAS NOT A FUGITIVE FROM JUSTICE.

This testimony would not go to the sufficiency of the indictment or to any matter of defense. It would be directed solely to the question whether he was a fugitive from justice—a question of fact."

It is well to reiterate the facts of that case in the language of the opinion itself:

"Thomas Bruce, the appellant, being in the custody of an agent of the state of New Jersey under the warrant of the governor of Maryland, applied to the Circuit Court of the United States for a writ of *habeas corpus*. * * * The writ of *habeas corpus* having been issued, the body of the prisoner was produced and a return made to the writ. This return avers that the prisoner, Thomas Bruce, is lawfully in custody by virtue of a warrant issued to the agent of the state of New Jersey by the governor of the state of Maryland upon the request of the governor of New Jersey, on the ground that said Thomas Bruce is within the state of Maryland as a fugitive from justice of the state of New Jersey under an indictment charging him with bigamy, a crime committed by him within the state of New Jersey against the laws of New Jersey. * * * To his return the petitioner Thomas Bruce replied that he was not lawfully in custody * * * AND ALSO DENYING THAT HE IS A FUGITIVE FROM JUSTICE IN THE SAID STATE. Hearing the return the court discharged the writ and remanded the prisoner to custody. Leave to appeal is granted and cause is here on eight assignments of error. * * * THE SEVENTH AND EIGHTH ASSIGNMENTS OF ERROR CHARGE ERRORS IN THE COURT IN EXCLUDING TESTIMONY OFFERED BY

THE PETIONER FOR THE PURPOSE OF SHOWING THAT WITHIN THE TWO YEARS SUCCEEDING MARCH 11, 1897, THE DATE CHARGED IN THE INDICTMENT AS THE DATE OF THE ALLEGED OFFENSE, THE PETITIONER WAS A RESIDENT WITHIN THE STATE OF NEW JERSEY AND, EXCEPT AT INTERVALS WHEN ABSENT ON BUSINESS, WAS NOT WITHOUT THE REACH OF CRIMINAL PROCESS IN SAID STATE, AND FURTHER THAT PETITIONER WAS A RESIDENT OF THE STATE OF NEW JERSEY, LIVING THERE EXCEPT AT INTERVALS WHEN ABSENT ON BUSINESS, PRIOR TO SAID ALLEGED OFFENSE UNTIL ABOUT DECEMBER 1, 1890. * * * WHEN THE CAUSE WAS HEARD IN THE CIRCUIT COURT NO TESTIMONY WAS RECEIVED UPON THE QUESTION, WAS THE PETITIONER A FUGITIVE FROM JUSTICE?"

We respectfully submit to the court that the facts in the two cases are so nearly on all fours that particular attention should be paid to the reasoning and decision of the Circuit Court of Appeals therein.

That the parallel may be more clearly set forth we again refer this Honorable Court to the facts in the case at bar.

The petition for the writ of *habeas corpus* in this matter [see page 6 of the transcript] distinctly alleges that "said Ernest C. Reed is not now and was not at the time the said requisition and the said governor's warrant were issued, nor at the time of the signing of said indictment, a fugitive from justice under section 5278, United States Revised Statutes."

The appellees justified under the writ of rendition issued by the Governor of the state of California and

the necessary documents preceding the granting of that writ, all of which are set forth in the transcript. Therefore, the question as to whether or not the petitioner in this matter was a fugitive from justice under section 5278, United States Revised Statutes, was thenceforward constantly before the court.

Pursuant to subdivision A of paragraph II of rule 24 of this court the petitioner sets forth the proceedings had in the court below as follows:

"The said Ernest C. Reed through his counsel then presented the points raised on behalf of said petitioner in paragraph I of said petition, subdivision (a), but was informed by said court that he did not care to hear from counsel thereon but to proceed with the argument on the question of the admissibility of evidence to show the bar of the statute of limitations.

"Under such admonition counsel then passed to the question of the right and duty of said District Court TO ADMIT EVIDENCE FOR THE PURPOSE OF SHOWING THAT THE ALLEGED CRIMINAL OFFENSE, IF ANY THERE WAS, WAS BARRED BY SECTION 5165 OF THE ANNOTATED CODES OF 1897 OF THE STATE OF IOWA. COUNSEL STATED TO THE COURT THAT HE WAS PREPARED TO SHOW BY WITNESSES THEN PRESENT IN THE COURT ROOM AND BY DEPOSITIONS TO BE TAKEN IN IOWA IN THE EVENT THAT THE COURT SHOULD RULE THAT TESTIMONY WAS ADMISSIBLE, THAT THE SAID ERNEST C. REED WAS FOR MORE THAN THREE YEARS AFTER THE ALLEGED OFFENSE WAS COMMITTED PUBLICLY A RESIDENT OF THE STATE OF IOWA; THAT FOR MORE THAN THREE YEARS AFTER SAID ALLEGED OFFENSE WAS COM-

MITTED THE SAID ERNEST C. REED WAS CONSTANTLY WITHIN THE REACH OF THE PROCESS OF THE STATE OF IOWA, BOTH CIVIL AND CRIMINAL, AND FOR THAT REASON SAID ALLEGED OFFENSE WAS BARRED BY THE STATUTE OF LIMITATIONS. THAT SAID EVIDENCE DID NOT GO TO THE DEFENSE OF THE MATTERS CHARGED IN THE INDICTMENT SET OUT IN SAID PETITION BUT WENT ENTIRELY TO THE QUESTION OF FACT ALWAYS OPEN TO PROOF, TO-WIT: WAS THE PETITIONER A FUGITIVE FROM JUSTICE? THAT IF IT COULD BE SHOWN THAT THE PROSECUTION WAS BARRED BY THE STATUTES, THE PETITIONER WAS NOT A FUGITIVE FROM JUSTICE AND THE WRIT OF HABEAS CORPUS SHOULD BE GRANTED AND THE PRISONER DISCHARGED FROM CUSTODY AND HIS BAIL EXONERATED." [Transcript, pages 4, 5.]

Is it possible for two cases to be more nearly alike in their facts than the instant case and the case of Bruce v. Raynor? In this connection we particularly call the court's attention to the language in the Bruce-Raynor case as follows:

"When the cause was heard in the Circuit Court NO TESTIMONY WAS RECEIVED UPON THE QUESTION was the petitioner a fugitive from justice. * * * The seventh and eighth assignments of error charge errors in the court in excluding testimony offered by the petitioner for the purpose of showing" the bar of the statute.

Thus the court will see that the cases are exactly alike. In both cases was testimony offered but not received, and in both cases was it offered for the purpose of showing that the petitioner was not "a fugitive from

justice." That petitioner in this case did make such offer is shown by the statement of the case, which statement has not been corrected or denied or attacked by the appellees in their brief as required by paragraph 3 of rule 24 of the rules of this court. Therefore, we reiterate that the petitioner is absolutely within the reasoning and decision of the case of Bruce v. Raynor.

In view of the foregoing we again quote at length from the opinion.

The court, in speaking of the said seventh and eighth assignments of error, relating to the offer of testimony to prove the bar of the statute of limitation, and commenting upon the fact that no testimony was received upon that question, said:

"Was this error on the part of the court? Section 2, clause 2, article IV of the constitution of the United States declares 'that the person charged in any state with treason, felony or any other crime, who shall flee from justice and be found in another state shall, upon the demand of the executive of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime.'

"Provision for executing the mandate of the constitution is made in sections 5278-5279, Revised Statutes of the United States. Whenever, however, a person charged with being a fugitive from justice is arrested under a warrant of the governor of a state for delivery to the authorities of the demanding state, he is entitled to invoke the judgment of the judicial tribunals, either federal or state, by writ of *habeas corpus,* upon the lawfulness of his arrest and imprisonment. * * *

When a demand of this character is made on a governor of a state, two questions are presented to him. * * * Second, Is HE A FUGITIVE FROM JUSTICE FROM THE STATE DEMANDING HIM? * * * A fugitive from justice is one who, having committed a crime within a state EITHER CONCEALS HIMSELF WITHIN THE STATE or departs therefrom so that he cannot be reached by ordinary process. Therefore, in determining whether he be delivered on the demand in which he is charged with crime, it must appear not only that he was properly indicted, it must also appear that he was within the state when the crime charged was committed AND ALSO THAT HE CONCEALED HIMSELF or had absconded so that he could not be reached by ordinary process. *Ex parte* Reggle, 114 U. S. 651. So IT WOULD SEEM THAT THIS QUESTION OF FACT IS ALWAYS OPEN TO INQUIRY. The mere requisition of the governor of the demanding state cannot be accepted as conclusive of the fact, else the accused person may be remanded notwithstanding the incontestable proof that he had never been within the state whose executive was demanding him. *Ex parte* Reggle, 114 U. S. 652. It is clear, therefore, that this fact is open to proof and examination, AND IF ONE FACT WHICH CONSTITUTES THE TERM 'FUGITIVE FROM JUSTICE' CAN BE INQUIRED INTO, WHY SHOULD NOT THE OTHER FACTS EQUALLY NECESSARY BE ALSO INQUIRED INTO?

"As is said in Hyatt v. New York, 23 Sup. Ct. 456: 'If upon a question of fact made before the governor which he ought to decide, there were evidence pro and con, the court might not be justified in reversing the

decision of the governor upon the question. In a case like that where there was some evidence sustaining the finding the court *might* disregard the decision of the governor as conclusive.' In the case at bar (as in the instant case) the record does not disclose whether any evidence was offered before the governor of Maryland (or California) or whether he acted solely on the requisition. In the case of *In re* Cook, 49 Fed. 841, Jenkins, J., speaking for the Circuit Court of Appeals, said: 'It is essential to compliance with such executive demand that the person whose surrender is demanded is adjudged a fugitive from justice of the demanding state. THE DECISION OF THE EXECUTIVE IS NOT CONCLUSIVE OF THAT FACT, and so we are of the opinion that the action of the executive is reviewable by federal tribunals AND IT IS COMPETENT FOR THE COURT TO DETERMINE WHETHER IN FACT THE DEMANDED PERSON IS A FUGITIVE FROM JUSTICE.' * * * An important question in this connection is what kind of testimony can be admitted. * * *

"It is stated in the petition of Thomas Bruce that he was living in New Jersey anterior to and at the time of the commission of the crime charged in the indictment and that he continued to live in the state of New Jersey, occasional absences on business excepted, up to December, 1900. DOES THIS ALLEGATION GO TO THE SUFFICIENCY OF THE INDICTMENT? IS IT A MATTER OF DEFENSE OR IS IT AN ALLEGATION BEARING UPON THE QUESTION IS HE A FUGITIVE FROM JUSTICE? * * * (Here follows the New Jersey Statute of Limitations.) The indictment in this case as we have

seen was found September 10, 1902, and charges the bigamous marriage of the petitioner as of the 11th of March, 1897. It thus appears that in order to prosecute, try or punish one charged with bigamy in New Jersey it must appear that he or she having a wife or husband living, has been guilty of the act of marriage to another person within two years of the finding of the indictment, and that unless such indictment is so brought within said two years the prosecution will not lie unless the person accused is a fugitive from justice. Now we have seen that to make one a fugitive from justice it must appear first that he was within the state at the time the crime charged is alleged to have been committed. Second, THAT BEING AMENABLE TO CRIMINAL PROCESS HE EITHER CONCEALS HIMSELF OR AVOIDED IT SO THAT IT COULD NOT BE SERVED, OR THAT HE DEPARTED THE STATE AND SO AVOIDED SERVICE. IF, THEREFORE, IT COULD BE SHOWN THAT HE DID NOT CONCEAL HIMSELF WITHIN THE STATE DURING THE PERIOD WHICH HE WAS AMENABLE TO CRIMINAL PROCESS, THIS WOULD BE EVIDENCE TENDING TO ESTABLISH THE FACT THAT HE WAS NOT A FUGITIVE FROM JUSTICE. THIS TESTIMONY WOULD NOT GO TO THE SUFFICIENCY OF THE INDICTMENT OR TO ANY MANNER OF DEFENSE. IT WOULD BE DIRECTED SOLELY TO THE QUESTION WHETHER HE WAS A FUGITIVE FROM JUSTICE, A QUESTION OF FACT. The court, as has been seen, can inquire whether the accused was within the state at the date of the alleged crime AND PURSUING ITS INQUIRY IT CAN ASCERTAIN IF, BEING WITHIN THE STATE AT THAT TIME, HE REMAINED WITHIN REACH OF

CRIMINAL PROCESS DURING THE WHOLE PERIOD FOR WHICH SAID PROCESS WOULD RUN. IF THIS BE ESTABLISHED THEN IT COULD REASONABLY BE CONCLUDED THAT HE IS NOT A FUGITIVE FROM JUSTICE AND SO NOT WITHIN THE PROVISIONS OF THE CONSTITUTION OR THE ACT OF CONGRESS. IT IS NOT A QUESTION OF PLEADING PRESENTED TO THE COURT ON THE TRIAL OF THE ACCUSED, AS IN UNITED STATES v. COOK, 17 WALL. 168, BUT A QUESTION OF FACT TO BE DISPOSED OF BEFORE REMANDING THE ACCUSED TO THE DEMANDING STATE. HE CANNOT BE REMANDED UNLESS HE BE A FUGITIVE FROM JUSTICE.

"To sum up, we are of the opinion that the Circuit Court hearing the case on the petition, return and replication in *habeas corpus* could judicially inquire into the sufficiency of the indictment under which the petitioner was demanded; THAT IT COULD ALSO JUDICIALLY INQUIRE INTO THE FACTS BEARING UPON THE QUESTION WHETHER THE PETITIONER WAS OR WAS NOT A FUGITIVE FROM JUSTICE, AND THAT THE COURT ERRED IN NOT PERMITTING TESTIMONY TO BE INTRODUCED TOUCHING THIS QUESTION.

"It is ordered that the cause be remanded to the Circuit Court WITH INSTRUCTIONS TO RECEIVE SUCH TESTIMONY AS WILL PROPERLY BEAR UPON THE QUESTION OF WHETHER OR NOT THE PETITIONER IN THIS CASE WAS A FUGITIVE FROM JUSTICE."

It is therefore respectfully urged that either the reasoning and decision in the case of Bruce v. Raynor is good or it is bad. If it is good, it should be followed.

If it is bad it should be expressly overruled. Particularly in view of the almost exact similarity of the facts in the two cases.

Petitioner therefore earnestly prays Your Honors that a rehearing may be granted in this matter, that the matters herein urged may be given the consideration to which they are entitled in the light of the case of Bruce v. Raynor, *supra*.

Ernest C. Reed
.....

Petitioner.

COLLIER, SHELTON & SCHLEGEL,

By Traubel Collier
Attorneys for Petitioner.

CERTIFICATE OF COUNSEL.

Collier, Shelton & Schlegel, attorneys for the petitioner Ernest C. Reed in the foregoing petition for rehearing, do hereby certify and state that in their judgment the foregoing petition for rehearing is well founded, and they further certify and state that the same is interposed in absolute good faith and not for delay.

COLLIER, SHELTON & SCHLEGEL,

By Traubel Collier
Attorneys for Petitioner.